No. 88-1181

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IN THE

Supreme Court of the United States

October Term, 1988

CRYSTAL CUNNINGHAM per next friend ROBERT RUBY CUNNINGHAM, and ASHLEY JOHNSON per next friend LARRY JOHNSON,

Petitioners,

v.

HARRY J. BEAVERS, Superintendent of Schools, Jacksonville Independent School District, MARY SUE BRUNO, Principal, Westside Kindergarten School, ROSA COOK, teacher, Westside Kindergarten School, TONY BOLTON Chairman, Jacksonville Independent School District Board of Trustees,

Respondents.

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF AMICI CURIAE

The National Committee for Prevention of Child Abuse ("NCPCA"), a non-profit organization established in 1972, is dedicated to the prevention of child abuse in all forms. NCPCA works through its chapters in all 50 states

and the District of Columbia to promote policies and programs designed to reduce violence against children. Child abuse prevention programs, such as those supported by NCPCA, teach children and parents that hitting is wrong, that it is against the law when severe, and that it is an ineffective way to solve problems. NCPCA has moved to intervene in this case because when children in Texas attend school, their lessons include seeing a school official hit a child (or themselves being hit by an adult). Thus the authority of the state asserts that hitting is an accepted form of interaction. NCPCA believes that it is essential that we promote the clearer standard that physical punishment, like other forms of abuse, is not a socially acceptable practice and should not be legally permitted. NCPCA opposes the use of corporal punishment in schools

and custodial settings and supports the use of appropriate disciplinary alternatives, and further supports the adoption of state and local legislation to prohibit corporal punishment in schools and all other institutions, public or private, where children are cared for or educated.

The American Medical Association ("AMA") is a private, voluntary, nonprofit organization of physicians. It was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, it is the largest health care organization in the United States, representing the interests of over 280,000 physicians and medical students.

The AMA has examined the medical, psychological, educational and social consequences of corporal punishment in the schools and has found

that there are serious detrimental effects. Moreover, research indicates that corporal punishment is not needed to maintain order in the schools. Consequently, the AMA opposes the use of corporal punishment in all educational institutions and has called for its abolition.

Amici Curiae respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on October 26, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 858 F.2d 269 (5th Cir. 1988), and is reprinted in the appendix to the Petition for a Writ of Certiorari filed in the above entitled proceeding, p. A-1.

The opinion of the United States District Court for the Eastern District of Texas, Tyler Division (Justice J.) has not been reported. It is reprinted in the appendix to the Petition for a Writ of Certiorari filed in the above entitled proceeding, p. C-1.

JURISDICTION

Amici Curiae adopt the statement of Jurisdiction as presented in the Petition for a Writ of Certiorari filed in the above entitled case.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Amici Curiae adopts and incorporates herein the Constitutional Provisions, Statutes and Regulations Involved reprinted in the Petition for a Writ of Certiorari filed in the above entitled proceeding.

STATEMENT OF THE CASE

QUESTIONS PRESENTED

Amici Curiae adopt the Questions Presented and Statement of the Case as presented in the Petition for a Writ of Certiorari filed in the above entitled case.

REASONS FOR GRANTING THE WRIT

I. IN INGRAHAM V. WRIGHT THE COURT LEFT OPEN WHETHER CORPORAL PUNISHMENT MAY VIOLATE A CHILD'S FOURTEENTH AMENDMENT RIGHT TO LIBERTY.

Twelve years ago, in Ingraham v. Wright, 430 U.S. 654 (1977), the Court was presented with a challenge to a Florida statute and certain school board regulations that permitted corporal punishment in public schools. Petitioners sued the principal, two assistant principals and the superintendent of the county school system under 42 U.S.C. §§ 1981-1988. Ingraham 430 U.S. at 654-655. Petitioners alleged that Appellants'

use of corporal punishment violated their constitutional rights under the Eighth and Fourteenth Amendments. Ingraham, 430 U.S. at 654. The Court granted certiorari on the questions of whether the corporal punishment was cruel and unusual punishment under the Eighth Amendment, and whether the corporal punishment violated Petitioners' procedural due process rights under the Fourteenth Amendment. Ingraham, 430 U.S. at 660. The Court found for Appellants on both issues and held: (1) that the Eighth Amendment does not protect school children, Ingraham, 430 U.S. at 672 and 684, and; (2) that the children's procedural due process rights were adequately protected by "Florida's preservation of common-law constraints and remedies." Ingraham, 430 U.S. at 684.

The Ingraham Court did not, however, foreclose all Federal

Constitutional issues associated with corporal punishment of children. To the contrary, it specifically stated:

> ... at least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated. [Footnote omitted]

Ingraham, 430 U.S. at 675.

As described below, five different Circuit Courts have defined the parameter of those interests in four different ways. Because Petitioners were injured in a Circuit that defines these rights narrowly their complaint was dismissed. They do not have the liberty interests that would be recognized in other Federal Circuits. This Petition asks the Court to return to the question left open in Ingraham; to define the impact of the Fourteenth Amendment's guarantee of

liberty as it limits a school official's freedom to hit children.

II. THE CIRCUIT COURTS ARE SPLIT ON WHETHER CORPORAL PUNISHMENT MAY VIOLATE A CHILD'S FOURTEENTH AMENDMENT RIGHT TO LIBERTY AND, IF SO, AT WHAT POINT.

Without the guidance of the Supreme Court, the five Circuit Courts that been presented within this issue[1/] have developed four different standards for determining a constitutional deprivation of a child's Fourteenth Amendment right to liberty. While four Circuit Courts, applying varying standards, have recognized that corporal punishment may violate a

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1/ These circuits are: the Fifth Circuit, Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976) (en banc); the Fourth Circuit, Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980); the Tenth Circuit, Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987), rehearing and rehearing en banc denied (1988), cert denied, 108 S.Ct. 1220 (1988); the Third Circuit, Metzger v. Osbeck, 841 F.2d 518 (3rd Cir. 1988), and; the Eighth Circuit, Wise v. Pea Ridge School District, 855 F.2d 560 (8th Cir. 1988)

child's Fourteenth Amendment right to liberty, the Fifth Circuit has consistently held that corporal punishment never gives rise to such a claim, no matter how egregious.

A child's Fourteenth Amendment right to liberty is never violated by corporal punishment in the Fifth Circuit even where a six year old's head wound from his teacher's hitting him on the head with a coffee mug required stitches, Coleman v. Franklin Parish School Board, 702 F.2d 74, 75 (5th Cir. 1983). In Ingraham, 525 F.2d at 917, the Fifth Circuit held that "having determined that corporal punishment itself and corporal punishment as circumscribed in Policy 5144 is not arbitrary, capricious, or unrelated to legitimate educational goals, we refused to look at each individual instance of punishment to determine if it has been administered

arbitrarily or capriciously." This rule of law is now firmly established in that Circuit. See Cunningham v. Beavers, 885 F.2d 269 (5th Cir. 1988), Woodard v. Los Fresnos Independent School District, 732 F.2d 1243 (5th Cir. 1984) and Coleman v. Franklin Parish School Board, 702 F.2d 74 (5th Cir. 1983)

The Third and Eighth Circuits have adopted a test that is the least restrictive of all the Circuits. In Metzger v. Osbeck, 841 F.2d 518 (3rd Cir. 1988) the Third Circuit held that "[a] decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child's Fifth Amendment liberty interest in his personal security and a violation of substantive due process prohibited by the Fourteenth Amendment." Metzger, 841 F.2d at 510. The Metzger court

adopted a balancing test used by the Second Circuit in another context:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id., quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir.), cert. denied, 414 U.S. 1033 (1972).

The Eighth Circuit followed the lead of the Third Circuit and adopted a test also taken from the context of a policy brutality case. Under that test, the court considers:

> 1) the need for the application of corporal punishment; 2) the relationship between the need and the amount of punishment administered; 3) the extent of injury inflicted; and 4) whether the punishment was administered in a good faith

> effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm.

Wise, 855 F.2d at 564.

Two other circuits have developed a standard in the middle ground between the Fifth Circuit's draconian approach and the Third and Eighth Circuit's more permissive threshold test. The Fourth Circuit has held that a child's Fourteenth Amendment right to liberty is violated when "the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." Hall, 621 F.2d at 613. This standard is the same standard used in police brutality cases. Id.

The Tenth Circuit has adopted the approach of the Fourth Circuit, i.e., applying the same standard as in police brutality case, but rejected the Fourth Circuit's requirement of "malice or sadism." Garcia, 817 F.2d at 655 n.7. So in the jurisdiction of the Garcia court, a child's Fourteenth Amendment right to liberty may be violated if "'the force applied caused injury so severe, was so disproportionate to the need presented, and... amounted to a brutal and inhumane abuse of official power literally shocking to the conscience[.]," Id., quoting Hall, 621 F.2d at 613.

These varied standards have a very practical significance to Crystal Cunningham and Ashley Johnson. The Fifth Circuit's absolute bar to claims of violations of a child's Fourteenth Amendment right to liberty required

dismissal of Petitioner's complaint. However, this same complaint would have, in all likelihood, survived a motion to dismiss in the Third or Eighth Circuits where the courts may decide on the facts whether such liberty interests have been violated. In Metzger, 841 F.2d 518 the Eighth Circuit left to the jury to decide whether the coach's use of choke-hold on a junior high school student, that caused the student to loose consciousness, constituted unreasonable force. Metzger, 841 F.2d at 521. In Wise, 855 F.2d 560, based on the specific facts presented, the Eighth Circuit upheld an order granting summary judgment. Wise, 855 F.2d at 562-563. Even if Petitioners ultimately lose their law suit, they are at least entitled to have a court--or a jury--in the Fifth Circuit assess the merits of their cases as they would

be if their complaints were brought in the Eighth or Third Circuits.

III. JUDICIAL UNIFORMITY IS ESPECIALLY IMPORTANT BECAUSE OF THE LARGE NUMBER OF INCIDENCES OF CORPORAL PUNISHMENT AND THE WIDE VARIATION AMONG THE STATES IN NUMBER OF THESE INCIDENCES.

Judicial uniformity is particularly desirable in the context of protecting individual rights. Here, the chaos of the Circuit Courts' decisions is magnified by the wide and varied use of corporal punishment as a disciplinary tool from state to state, and within some states, from school district to school district. According to the U.S. Department of Education's Office of Civil Rights, and data analyzed by the National Coalition of Advocates for Students, in 1986 1,993,895 students were corporally punished by teachers and principals, out of a national school population of

141,156,285.[2] What is particularly abhorrent is the wide disparity of the rate of corporal punishment of black and hispanic students, compared to the rate of corporal punishment of white students, particularly in some of the southern states.

The one in twenty students who suffered this often traumatic experience were not evenly distributed throughout the United States or among racial groups within each of the states. Texas school children were 50% more likely than the national average to suffer corporal punishment. Texas has the seventh highest rate of such punishment.[3] In some Texas

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[2] This does not represent the number of incidents of corporal punishment, because it does not reflect the repeated use of corporal punishment against any one child. Statistics on repeat beatings are not available.

[3] The six states with the highest total corporal punishment rates are: Arkansas (13.71%), Mississippi (10.33%), Alabama (10.31%), Tennessee

districts, one in three children (six times the national average) suffer corporal punishment each year. Three school districts in Texas appear on the list of the twenty school districts out of a national sample, with the largest difference between black and white corporal punishment rates.[4/] Among the twenty school districts in Texas with the highest rates of total corporal punishment the range is from 36.78% (Diboll Independent School District in Diboll, Texas) to 14.41% (Waxahachie Independent School District in Waxahachie, Texas). The ratio of the rate of corporal punishment of black to white students, in the twenty

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(8.76%), Oklahoma (7.95%) and Georgia (7.81%).

4/ Arizona and Alabama each also have two school districts in this "top twenty" list and Georgia has the dubious honor of featuring four school districts on this list. The other states represented are: Florida (two districts) and Tennessee, Mississippi, Louisiana, Indiana and Oklahoma, with one each.

districts with the highest disparity, ranges from 2.31 to 1.78.

IV. CHILDREN AS A GROUP HAVE UNIQUE CHARACTERISTICS THAT REQUIRE JUDICIAL PROTECTION.

In the twelve years since Ingraham was decided, one of the foundations of the Court's defense of corporal punishment -- public and professional opinion -- has seriously eroded. The Court noted there that "[o]pinion surveys taken since 1970 have consistently shown a majority of teachers and the general public favoring moderate use of corporal punishment in lower grades." Ingraham, 430 U.S. at 661 n.17. This is simply no longer true. National organizations of professionals and experts involved in child care now favor abolition of corporal punishment in schools. For example, the National Education Association has stated that it believes "corporal punishment should

not be used as a means of disciplining students." National Education Association of the United States of America, Resolutions, Legislative Program, and New Business Resolutions, § C-18 (1987-1988). The American Medical Association, the American Academy of Pediatrics, the American Psychological Association and the American Bar Association have issued a joint statement opposing the use of corporal punishment in schools.5/ The number of organizations that have taken

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5/ Other national organizations that oppose the use of corporal Punishment in schools include:

> American Civil Liberties Union, American Humanist Association, American Orthopsychiatric Association, Association of Junior Leagues, Child Welfare League of America, National Association of School Psychologists, National Association of Social Workers, National Committee for Citizens in Education, National Mental Health Association, and National PTA.

a stand on this issue shows its importance, and the stand they have taken -- against the use of corporal punishment in schools -- evidences a national trend away from accepting corporal punishment as a disciplinary tool that had only begun when Ingraham was before the Court.

When Ingraham, was decided, only two states,[6] New Jersey and Massachusetts, expressly prohibited corporal punishment. Now, eleven states[7] prohibit its use, two states are contemplating its prohibition,[8] and in most of the states which allow individual school boards to develop

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6/ The Court was relying on legislation in place in 1976.

7/ The eleven states are: California; Maine; Massachusetts; Nebraska; New Hampshire; New Jersey; New York; Rhode Island (Corporal punishment prohibited by each school district); Vermont; and Wisconsin.

8/ Michigan and Ohio have bills pending that would prohibit corporal punishment.

their own policy, at least some of those school boards prohibit its use.[9/] This movement clearly reflects a shift in public and professional attitudes toward the elimination of corporal punishment.

The issues raised by Petitioners are not abstract or theoretical. Corporal punishment literally touches every child in a school where it is administered. It equally affects those who are its direct victims, those who are witnesses to its administration, and those who merely feel its threat. It is most imperative to these children that the Court provide some standard by which the lower courts may uniformly assess specific incidents of corporal

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9/ These states are: Alabama; Alaska; Georgia; Idaho; Kansas; Kentucky; Maryland; Mississippi; Nevada; New Mexico; and Wyoming.

punishment for constitutional violations.

V. CHILDREN AS A GROUP HAVE UNIQUE CHARACTERISTICS THAT REQUIRE JUDICIAL PROTECTION.

Justice Stone's "Footnote Four" in United States v. Carolene Products Co., 304 U.S. 144 (1938) establishes the basis for a high level of judicial scrutiny of state statutes that are challenged as violating the Bill of Rights. After stating that economic legislation should be struck only if it has no "rational basis," Carolene Products Co., 304 U.S. at 152, in Footnote Four, Justice Stone distinguishes other areas that may demand a more exacting scrutiny, including

> whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may

> call for a correspondingly more searching juridical inquiry.

Carolene Products Co., 304 U.S. at 152-153 n.4. The judicial branch is uniquely responsible for protecting the constitutional rights and interests of those who are denied access to or a voice in the political process. Different groups are afforded varying levels of protection from violations of their constitutional rights depending often on the discrimination, and lack of access to the political process, members of the group have historically suffered. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 685-686 (1973) (Comparing history of discrimination against women and history of discrimination against blacks), Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-176 (1972) (Tracing the history of

discrimination against illegitimate children).

Justice Stone's analysis is clearly relevant here, and under it the Court has an obligation to show a special sensitivity to possible violation of children's Constitutional rights. Without the right to vote, children are powerless in the political process. They have no access to legislators, and no means through which to make their needs heard or to have their rights and interests protected. They are "perennial losers in the political struggle." L. Tribe, American Constitutional Law, p. 1002 (1978). Children are uniquely vulnerable to decisions made by others ostensibly in their best interests. Corporal punishment epitomizes this vulnerability. Legislators acceding to the will of a majority of adults have not heard the children's protests, and

they cannot because legislators can only hear the voices of the voting public. It is up to the Court to represent the interests and protect the rights of non-voting children by determining how far corporal punishment may go before it transgresses those children's right to be free from "unjustified intrusions on personal security." Ingraham, 430 U.S. at 674, 97 S.Ct. at 1413.

CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari filed in the above entitled proceedings, the petition for certiorari should be granted.

Respectfully Submitted,

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